

STATE OF MICHIGAN
COURT OF APPEALS

ASSET ACCEPTANCE, LLC,

Plaintiff-Appellant,

v

FLORA L. MORGAN,

Defendant-Appellee.

UNPUBLISHED

March 29, 2007

No. 264494

Wayne Circuit Court

LC No. 04-415929-AE

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the circuit court order reversing the district court's \$17,160.36 judgment in favor of plaintiff following a bench trial. We reverse and remand for reinstatement of the district court judgment.

I

This appeal arises from an installment contract entered into by defendant and her brother to purchase a manufactured home in January 1994. Defendant and her brother breached the installment contract by failing to make timely payments. A notice of default, dated November 1, 1997, was sent to defendant at the Las Vegas, Nevada address where the manufactured home was located with the notice providing that, if the default of \$542.26 was not cured, the contract would be automatically accelerated on December 1, 1997, rendering full payment of the total remaining amount due, \$26,239.32, due and payable. On October 23, 1999, the home was repossessed with \$1,353.89 past due on the installment contract, and on December 23, 1999, the home was sold at auction for \$11,453.12 less than what was owed on the installment contract. In April 2002, the installment contract was assigned to plaintiff.¹

On February 20, 2003, plaintiff filed the instant action in district court for the deficiency. Defendant asserted that plaintiff's claim was barred by the four-year statute of limitations, MCL

¹ Defendant disputes that the contract was assigned to plaintiff and asserts that plaintiff instead purchased defendant's defaulted account from a third party. However, this disputed fact is not germane to our disposition.

440.2725(1), and moved for summary disposition under MCR 2.116(C)(7). While the district court seemingly concluded that a factual dispute existed regarding whether the statute of limitations had expired, the court declined to render a decision on defendant's motion until after a bench trial was held. Following the bench trial, the district court indicated that it was denying defendant's motion based solely on the pleadings and documented evidence, and entered judgment in favor of plaintiff. On appeal, the circuit court reversed the district court's judgment, concluding that summary disposition should have been granted under MCR 2.116(C)(7) because no genuine issue of material fact existed regarding whether the limitations period had expired.

II

Plaintiff argues that the circuit court erred in concluding that summary disposition for defendant was proper under MCR 2.116(C)(7). We agree. A decision on a motion for summary disposition under MCR 2.116(C)(7) involving whether a claim is barred by the statute of limitations is reviewed de novo. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). A court must consider all the documentary evidence submitted by the parties and accept as true the allegations of the complaint unless those allegations are specifically contradicted by affidavits or other appropriate documents. *Id.* "A motion brought pursuant to MCR 2.116(C)(7) should be granted only if no factual development could provide a basis for recovery." *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 7; 614 NW2d 169 (2000).

Because plaintiff filed the instant complaint on February 20, 2003, at issue is whether the cause of action accrued on or before February 20, 1999. Under MCL 600.5836, a claim on an installment contract accrues after each installment becomes due unless the contract contains an acceleration clause that is exercised. *Sparta State Bank v Covell*, 197 Mich App 584, 587-588; 495 NW2d 817 (1992). If an acceleration clause is exercised, the entire unpaid balance under the contract becomes due, and the statute of limitations period no longer runs separately after each installment becomes due. *Id.*

In a co-obligor setting, however, MCL 600.5825 tolls a statute of limitations against joint obligors if a co-obligor consents or acquiesces to payments made by another co-obligor on an outstanding balance. See *Campbell v Campbell*, 102 Mich App 462, 466-470; 301 NW2d 896 (1980) (relying in part on *Hupp Farm Corp v Neef*, 294 Mich 160; 292 NW 689 [1940]). In *Hupp Farm Corp*, the Court noted that, as a general rule, "where there are joint debtors on an obligation, a payment, after the statute has run, by one of the joint debtors binds him only and starts the statute anew as to him only," unless "the payment was 'authorized or ratified' by the other joint maker." *Id.* at 166 (citations omitted). Accordingly, the parties dispute whether MCL 600.5825 applies to defendant on the basis that she never admitted to making or consenting to any payments during the relevant time period, and did not authorize or ratify the payments made.

A

The evidence submitted to the district court by the parties with respect to the motion for summary disposition indicated that someone made payments on the contract after November 1, 1997 as reflected by the difference in the amount owed at that time compared to the amount owed on November 5, 1999. Indeed, the circuit court also concluded as much. Therefore, the evidence indicated that someone, which may have included defendant, made those payments, thereby tolling the statute of limitations until June 25, 1999, which was the next due date under the contract. See *Campbell, supra* at 467-470.

The circuit court erred when it reasoned that evidence was necessary to show that defendant consented to or had knowledge of the payments made. Such a showing was unnecessary because, when properly reviewing the summary disposition motion, there was a genuine issue of material fact concerning whether defendant effectively authorized or ratified the payments, regardless whether defendant claimed that she had not personally made the payments. See *Cole, supra* at 6-7. Therefore, the circuit court erred in reversing the district court order and in granting summary disposition for defendant under MCR 2.116(C)(7).

B

After hearing the evidence presented at trial, the district court properly entered judgment in favor of plaintiff because defendant failed to meet her burden of establishing that the statute of limitations had expired. The burden of establishing that a statute of limitations bars an action is normally on the party asserting the defense. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 74; 577 NW2d 150 (1998). Further, following a bench trial, the trial court's factual findings are reviewed for clear error, and its conclusions of law are reviewed de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

We conclude that the district court properly entered judgment in favor of plaintiff for the delinquent balance. Again, the only issue is whether the four-year limitations period under MCL 440.2725(1) had expired when the complaint was filed on February 20, 2003. Pursuant to the rule in *Hupp Farm Corp*, the statute of limitations is tolled against joint obligors if a co-obligor consents or acquiesces to payments made by another co-obligor on an outstanding balance. See *Campbell, supra* at 466-470; see also MCL 600.5825. However, here, the trial court did not clearly err in finding that the limitations period was not tolled with respect to defendant and had not expired as of February 20, 2003. In comparing the principal balance on November 1, 1997, with the balance on November 5, 1999, plaintiff's collections manager and record custodian testified that \$3,840 in payments on the installment contract had been made in the interim. In finding that defendant must have been aware of, and therefore authorized, payments made on the installment contract after November 1, 1997—based on defendant's testimony that she traveled to the manufactured home in Las Vegas to visit her brother—the district court concluded that the limitations period had been tolled until June 25, 1999, which was the “next due” date as provided under the November 5, 1999 repossession notice.

While there was no evidence to indicate when the last payment on the contract was made, i.e., whether it was made before February 20, 1999, defendant had the burden of proving that it was made before that date. *Forest City Enterprises, Inc, supra* at 74. Defendant failed to meet her burden, and those payments could have been made up until the time of the next due date on June 25, 1999. Deferring to the district court's assessment of the evidence and superior ability to assess witness credibility, *Glen Lake-Crystal River Watershed Riparians, supra* at 531, we are not left with a definite and firm conviction that a mistake was made by the court.

Reversed and remanded for reinstatement of the district court's judgment. We do not retain jurisdiction.

/s/ Janet T. Neff

/s/ Donald S. Owens